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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 488

JAY M. ROWLAND,

Petitioner,

vs.

STATE OF ARKANSAS,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS.

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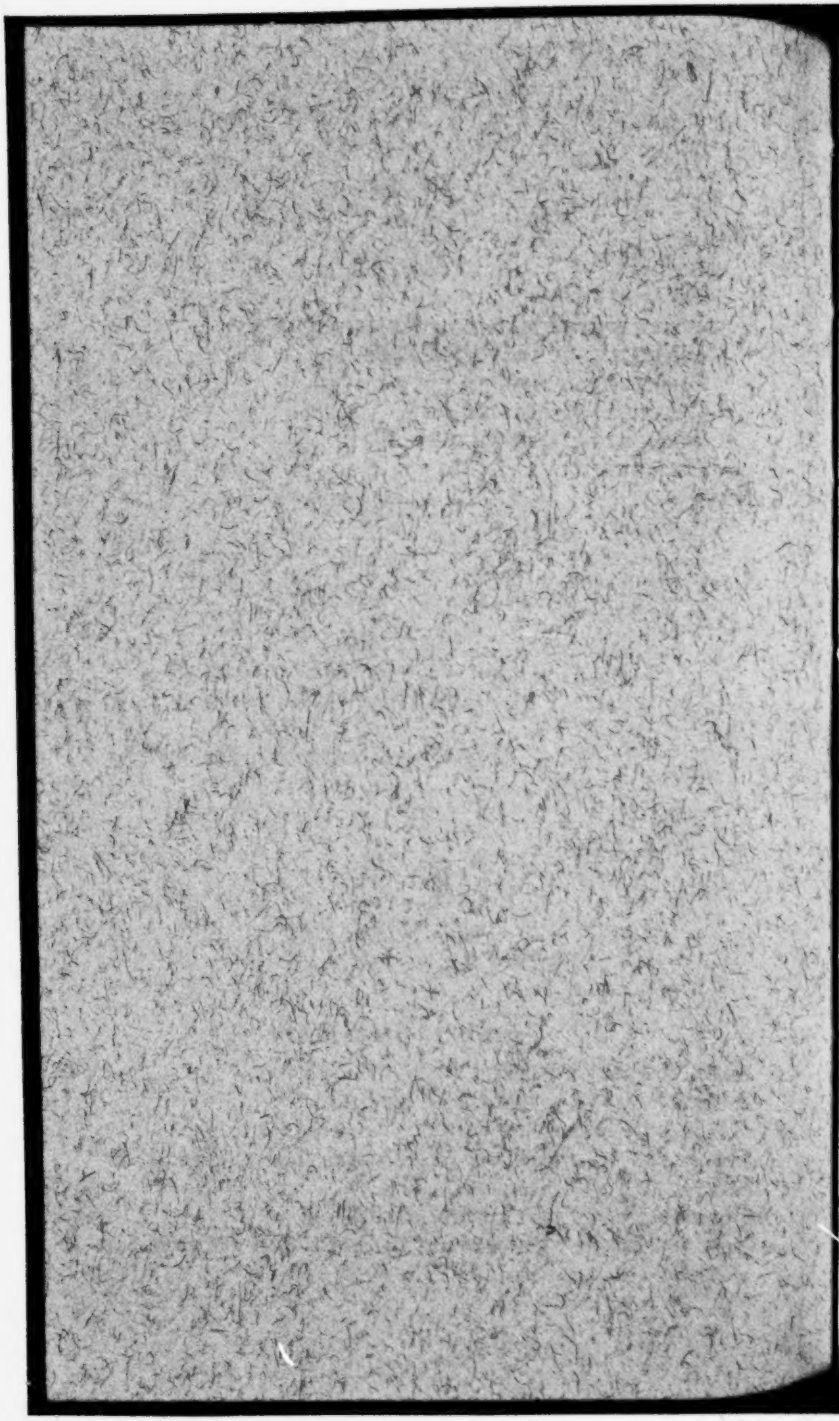

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

Jay M. Rowland prays that a writ of certiorari issue to review a decision of the Supreme Court of Arkansas, which is the highest tribunal in the State of Arkansas, rendered June 27, 1948, petition for a rehearing denied on October 4, 1948, which decision affirmed a judgment of the Garland Circuit Court, finding petitioner guilty of bribery.

Opinion Below

The opinion of the Supreme Court of Arkansas has not yet been officially reported. It appears in the Record at pages 93-111.

Summary Statement of Matter Involved

The petitioner, Jay M. Rowland, is a citizen of the City of Hot Springs, Garland County, Arkansas. From April, 1944, until April, 1948, he was the duly elected and qualified City Attorney of the City of Hot Springs. For a long period of time prior to his election as City Attorney he had been prominently identified with the McLaughlin administration, which had controlled substantially all of the public offices of Hot Springs and Garland County, Arkansas, since the year 1927.

In the summer of 1946, an organization was developed for the announced purpose of defeating the McLaughlin administration and ousting its members from public office. This group was headed primarily by veterans of World War II and all of its candidates for office were ex-service men. This group designated itself as "The G.I.'s." An intense political contest ensued. The G.I. candidates were elected to office in a very close election. Among the offices to which G.I.'s were elected were the office of Circuit Judge, the office of Prosecuting Attorney, and the office of Sheriff. During the heat of the campaign the G.I. candidate for Circuit Judge made a statement given wide publicity in the press, as follows:

> "I make you this pledge. On the day that I am sworn in as Circuit Judge I will empanel a Grand Jury and instruct its members to investigate Leo P. McLaughlin and to return an indictment charging malfeasance and misfeasance in office. If that Grand Jury cannot find the evidence and does not return an indictment, I immediately will appoint another Grand Jury that will." (R. 74.)

Immediately after his induction into office in January, 1947, the new Judge, at his induction ceremony, made the following statement:

"We assure our friends that every campaign promise we made will be kept." (R. 74.)

This statement, too, was given wide publicity in the press. In apparent fulfillment of these threats, the newly elected judge, on February 21, 1947, dismissed the regular grand jury of Garland County, although he had never called this jury into session, and although it had not made its final report. At the time of its dismissal prisoners were in the County Jail awaiting action by the grand jury.

The Court instructed the sheriff to call a special grand jury (R. 8). It was well known that this jury would be asked to return indictments against this petitioner and other members of the McLaughlin administration (R. 9). The sheriff discussed prospective jurors with the judge and with the prosecuting attorney before they were included in the list of jurors (R. 6-7). Some of the jurors themselves were contacted either by the prosecuting attorney or the sheriff before their selection (R. 24). The only jurors summoned were those known to be friendly to the G.I. administration (R. 12). Of the sixteen grand jurors called, ten admitted that they had made campaign contributions to the G.I. candidates (R. 25, 27, 32, 34, 36, 43, 45, 47, 52, 55). None were sympathetic with the McLaughlin adimnistration (R. 12). Nine indictments were returned against this petitioner and sixteen indictments were returned against Leo McLaughlin (R. 70).

The special grand jury did not consider any business other than possible violations of law by members of the McLaughlin administration (R. 70). The prosecuting attorney did not request action as to prisoners under arrest and confined in the County Jail (R. 70).

The evidence is clear that the county and state officials deliberately and studiously excluded from jury service those citizens of Garland County who were members of the

political organization to which the defendant belonged and in which he occupied a prominent position. The prosecution was determined to insure a grand jury composed of persons most likely to have personel and political prejudice against the petitioner.

The charges against the petitioner were the direct result of an intense political contest. The case had a strong political bearing and fostered strong political feeling. The trial was a cause celebre—one that the entire State followed with great interest. Upon his aggressiveness in this and related trials the prosecutor campaigned for and was elected to the office of Governor of Arkansas. The petitioner submits that a fair and impartial jury, one without class discrimination, required the selection of the jury without regard to political affiliations; that, although ordinarily politics may be unimportant in the selection of a jury, under the circumstances in this case it cannot be disregarded as a prejudicial factor.

The unusual procedure did not cease with the filing of the indictments. Thereafter petitioner filed a motion to quash the indictment (R. 72). The judge announced his disqualification through the press and exchanged circuits with a judge of his own selection (R. 73). The judge on exchange heard the motion to quash and overruled it (R. 76). The judges re-exchanged circuits (R. 76). Petitioner filed a motion and amendment thereto suggesting the disqualification of the judge (R. 73-76). Again circuits were exchanged (R. 78) and petitioner presented a motion to the judge on exchange asking that the election of a Special Judge be had by the members of the Bar as provided by the Arkansas Constitution (R. 77-78). The judge refused to pass on this motion, ordered the petitioner arraigned and petitioner objected and plead "Not Guilty"

to the indictment. There being no further business, the judges re-exchanged circuits (R. 76).

Petitioner filed a third motion asking the right to be heard and present witnesses on the two former motions (R. 78-79). The disqualified judge then assumed jurisdiction of the case, entered an order overruling all three motions and again announced his action through the press (R. 79). The State did not question or deny any of the allegations in the three motions. Petitioner filed a written pleading stating that neither he nor his counsel had notice and were thereby deprived of an opportunity to be present and be heard, and objected to these proceedings. The State did not controvert this pleading (R. 79-80).

Petitioner demurred to the indictment in that it was duplicitous and did not charge an offense against petitioner (R. 80-81). The State stipulated that petitioner would be tried on one felony only (R. 84), then the court overruled the demurrer (R. 83).

The Bill of Particulars tends only to increase the vagueness and uncertainty of the purported charge against petitioner (R. 81-82).

The first trial consumed three days. The jury was discharged, divided six to six, and an order of mistrial entered. Retrial under the same indictment was set for the following morning and the sheriff ordered to summon another jury (R. 83-84).

The second trial also consumed three days and a verdict of guilty was returned on Sunday with the penalty of one year in the penitentiary and a fine of $750.00 (R. 85). Judgment rendered Sunday, October 12, 1947 (R. 84-85).

A motion in arrest of judgment was filed and overruled (R. 85-85). A motion for a new trial was filed and overruled (R. 86-91). Petitioner was sentenced, and an appeal granted to the Supreme Court of Arkansas (R. 90-91), where the judgment was affirmed. A petition for rehearing (R.

112) was summarily denied by the court October 4, 1948 (R. 114).

At the trial the following facts appeared:

That the office of City Attorney of cities of the first class was created by Section 9819 of Pope's Digest, same being an Act of the Legislature of 1894 (See Appendix). That under the provisions of this Act the City Council is to prescribe by ordinance the duties and authority of the City Attorney. Hot Springs was and is a city of the first class.

In March 1896 the last ordinance repealing all former ordinances with reference to city attorneys was adopted (See Appendix).

That in 1941 petitioner entered into an agreement with McCraw to represent him in civil matters wherefor he was to receive a retainer fee of $50.00 per month; that this agreement continued from 1941 throughout 1946; that in 1944 petitioner was elected City Attorney of the City of Hot Springs.

That McCraw had been operating a bookmaking establishment in Hot Springs since 1936; that McCraw was charged in the indictment returned against petitioner with paying the retainer fees as bribes to influence petitioner's actions and decisions as City Attorney with reference to the gambling ordinance adopted by the City Council of Hot Springs in 1886. Petitioner was convicted for receiving the money as bribes for not having prosecuted McCraw under the said city ordinance.

The court instructed the jury that the accused was charged with "accepting and receiving" bribes (R. 91-92) and instructed them that it was the duty of the accused to prosecute McCraw under the said city ordinance (R. 91-92). The Supreme Court, in its opinion, held that it became the duty of petitioner to prosecute McCraw by virtue of Section 9585 of Pope's Digest, a penal statute

providing for the removal of elected city officials (See Appendix).

Statement as to Jurisdiction

This court has jurisdiction under the provisions of Section 237 (b) of the Judicial Code, as amended, 28 U. S. C. 344(b). In the proceedings below there was drawn in question the rights of the petitioner under the 14th Amendment to the Constitution to have a fair and impartial judge presiding in the prosecution. The question was raised in the motion suggesting the disqualification of the judge and amendment thereto (R. 73-76), and was again raised in the petition for rehearing (R. 112) which was summarily denied (R. 114).

Section 3249 of Pope's Digest, the bribery statute, as construed and applied in this case is in direct conflict with the former construction and application by the Supreme Court of Arkansas in the case of *Sims* v. *State*, 131 Ark. 185. As construed and applied in this case it departs from the principle that guilt is personal and is not to be imputed from one person for the misconduct of another, and is in violation of the 14th Amendment. This question was raised by the demurrer to the indictment and in the petition for rehearing (R. 112). The demurrer was overruled (R. 83) and the rehearing denied (R. 114). Cf. *Howard* v. *Kentucky*, 200 U. S. 164; Cf. *Great Northern Railway Company* v. *Sunburst Oil and Refining Company*, 287 U. S. 358.

There was also brought in question the construction and application of Section 9585 of Pope's Digest, a penal statute providing for the removal of elected city officials (See Appendix). Interpretation and application as applied to the petitioner violates his rights under the 14th Amendment. This is the first time that this statute has been interpreted but the said interpretation and application enlarge the duties of the petitioner as City Attorney

to such an extent as to sustain his conviction for failure to perform duties which before such judicial determination petitioner did not know existed, and by literal reading of the statute could not determine. Cf. *Connally* v. *General Construction Company*, 269 U. S. 385; Cf. *Great Northern Railway Company* v. *Sunburst Oil and Refining Company*, *supra*.

This statute and the indictment are unconstitutionally vague and uncertain. Cf. *Lanzetta* v. *New Jersey*, 306 U. S. 451. And could not be fairly understood in advance of judicial utterance.

The petition for a rehearing pointed out this error and also raised the objection that affirmance of conviction under a statutory provision not included in the indictment itself violated the 14th Amendment. The petition for a rehearing was summarily denied (R. 114).

Prospective jurors must be selected by court officials without systematic and intentional exclusion of any of the economic, social, religious, racial, political, and geographical groups of a community, since jury competence is an individual rather than a group or class matter. See *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217, 66 S. Ct. 984.

The purpose, method of selection, type of jurors, the role and activity of the Circuit Judge and Prosecuting Attorney (State officers) in choosing jurors composing the special grand jury was drawn in question in the proceedings below as an infringement upon petitioners rights under the Fourteenth Amendment. Although we do not find a case squarely presented to the Supreme Court of the United States where partisan politics and the desire for political gain, profit and advancement by State Officers is the moving consideration in the selection of a special grand jury, yet the action of these State Officers constitutes action by the State in depriving petitioner of his constitutional rights.

It is clearly within the jurisdiction of this Court to consider petitioner's appeal to the Due Process Clause, and exercise its discretion with reference to the circumstances of the present case. This question was again raised in the petition for rehearing (R. 112), which was summarily denied (R. 114). Petitioner was a leading member of the excluded class or group.

An allegation of discriminatory practices in selecting a grand jury panel challenges an essential element of proper judicial procedure—the requirements of fairness on the part of the judicial arm of government in dealing with persons charged with criminal offenses.

It is the findings of the State Courts on undisputed facts or the undisputed facts themselves which ordinarily furnish the basis for our appraisal of claimed violations of federal constitutional rights. See *Chambers* v. *Florida*, 309 U. S. 227, 239, 60 S. Ct. 472, 478, 84 L. Ed. 716; *Ashcraft* v. *Tennessee*, 322 U. S. 143, 152, 153, 154, 64 S. Ct. 921, 925, 926, 88 L. Ed. 1192; *Molinski* v. *State of New York*, 324 U. S. 401, 404, 65 S. Ct. 781, 783, 89 L. Ed. 1029.

Statutes Involved

Section 9819 of Pope's Digest creating the office of City Attorney in cities of the first class (Appendix); Ordinance of 1894 specifying the authority and duties of the City Attorney of the City of Hot Springs, Arkansas, repealing all former ordinances (Appendix); Section 3249 of Pope's Digest, the bribery statute under which petitioner was convicted (Appendix); Section 9585 of Pope's Digest, the penal statute for removal of city officials (Appendix).

Questions Presented

1. Was petitioner denied due process of law or the equal protection of the laws in violation of the Fourteenth

Amendment by the circumstance that the Circuit Judge and Prosecuting Attorney, imbued with the desire for political advancement and gain, assisted and advised the Sheriff in the selection of the Special Grand Jury from their political group, by systematic, intentional and knowing exclusion of members of the political group to which petitioner belonged and in which he occupied a prominent position?

2. Was petitioner denied due process of law or the equal protection of the laws in violation of the Fourteenth Amendment by the circumstance that his conviction was affirmed and that his right to a fair and impartial judge was denied in express terms, or was denied in substance and effect by putting forward non-federal grounds of decision (exchange of circuits) without fair or substantial support?

3. Was petitioner denied due process of law or the equal protection of the laws in violation of the Fourteenth Amendment, by conviction upon a charge not made, or upon a charge of guilt against another, being imputed to petitioner, or upon charges too vague or indefinite, occasioned by applying a new construction of the bribery statute?

4. Was petitioner denied due process of law or the equal protection of the laws in violation of the Fourteenth Amendment, by first impression construction of a State penal statute, enlarging petitioner's duties, thereby creating a new offense after the event, where the statute admits of such a double meaning that the petitioner may act upon the one conception of its requirements and the courts upon another?

Reasons for Granting the Writ

The writ should be granted because: (1) the issues involved have not been determined by this Court; (2) they

are of great public importance; (3) the decisions below contravene principles established by the decisions of this Court.

1 (a) This Court has not determined the extent of infringement on due process or equal protection drawn in question wherein the injection of partisan politics, and the desire for political advancement, profit and gain by the Circuit Judge and Prosecuting Attorney (State action) causes the selection and empaneling of a Special Grand Jury from their own political group, and the intentional and systematic exclusion of the political group of which petitioner is a leading member, where it is clearly shown that the absence of petitioner's class was caused by discrimination. This is a matter of great public interest and concern because of the growing tendency to prosecute opponents for political purposes.

(b) This Court has never passed on the validity, either on its face or as applied, of the statutory provision under which the petitioner was indicted and convicted at trial. This provision as applied at trial makes felonious the mere act of accepting money and bribes, being qualified, if at all, only by the condition precedent that the bribe giver, not a defendant, be charged with giving bribes with the intent to influence.

(c) Although it is elementary that due process prohibits conviction on charges not made, we are not aware of any decision of this Court which squarely considered whether this principle was infringed because the State appellate court affirmed a conviction on the basis of charges not made, or on diverse charges against one who need not be the person tried, imputed against accused.

2 (a) In practical effect, the statutory provisions under which petitioner was convicted and the application in this case constitute a device to evade, through obscurity of lan-

guage and application, the inhibitions on State action. Deeds theretofore not subject to punishment fall within the general scope of their prohibition. Common experience has not created a general understanding of their criminality. Consequently, in order to adequately inform the public of the limitation on conduct, a more precise definition is necessary to meet constitutional requirements. *Cf. Cole* v. *State of Arkansas,* Supreme Court Reporter, Vol. 68, No. 8, 514; *Connelly* v. *General Construction Company,* 269 U. S. 385; *Lanzetta* v. *State of New Jersey,* 306 U. S. 451. Any encroachment upon these principles is *per se* of great concern to the Bench and Bar and to the public generally.

(b) It is a matter of great public interest that the right guaranteed by the Fourteenth Amendment to a fair and impartial judge, should not be violated by the subterfuge of exchanging circuits, thereby allowing a judge who is disqualified from personal bias and prejudice to select a judge on exchange who is also imbued with bias and prejudice to the extent that he will not act on a motion, and the further violation of the Fourteenth Amendment by the disqualified judge, at his own will and pleasure, assuming jurisdiction and summarily overruling motions and petitions filed by a defendant without giving defendant notice so that he may be heard or appear by counsel and consult with counsel after arraignment in an effort to obtain a fair and impartial judge.

3 (a) As newly interpreted, the statutory provisions under which petitioner was tried make it a felony for an attorney holding public office or place of trust or profit to receive a fee for any service, however innocent the purpose, only by charging the person (who need not be the person tried) with paying it with the intent to influence. So construed, it clearly violates due process by departing from

the principle that guilt is personal and is not to be imputed to one person for another's misconduct.

(b) Conviction upon a charge not made, or conviction upon fifteen (15) charges when one only is stipulated would be sheer denial of due process. And "it is perfectly obvious that where . . . an appeal is provided for, and the prisoner has had the benefit of it, the proceedings in the appellate tribunal are to be regarded as a part of the process of law under which he is held in custody by the State, and to be considered in determining any question of alleged deprivation of his life or liberty contrary to the 14th Amendment." *Frank* v. *Mangum*, 237 U. S. 308, 327. Since the indictment gave no fair notice that such a crime was charged, but on the contrary charged a different offense against another, not a defendant, petitioner was convicted upon a charge not made against him.

(c) The Supreme Court of Arkansas, in its former construction of this identical statute in *Sims* v. *State*, 131 Arkansas 185, cited by petitioner in his brief, listed in the opinion, without comment, is in direct conflict, quote,

"The question, then, is squarely presented whether under the statutes of this state the guilt of a bribe taker depends solely upon his own corrupt intention, or whether it is an essential element of his guilt that the bribe giver should also have acted with guilty intention of influencing official action in giving the bribe. . . .

"It is argued that the use of the word 'and' in joining the bribe receiving official with the bribe giver necessarily makes the guilty intention of the latter. We think that that is not a reasonable interpretation of the statute and that it would lead to illogical results. For instance, if that interpretation were correct then an official by receiving money might be guilty of a crime without any guilty intention or actual participation in the guilt of the bribe giver. . . ."

Under this former holding, petitioner was neither charged with nor guilty of the crime of which he was convicted.

(d) The Supreme Court of Arkansas has singled out the word "bribe" from the list of things that may be given by a bribe giver with intent to influence official action; and by dictionary definition and judicial utterance, raised it in grade and meaning far above the words with which it is associated in the statute, and infused it into being a specific charge of intention to influence petitioner in his duty as City Attorney, which duty is created by the Supreme Court by interpretation of first impression of a penal statute providing for the removal of elected city officials, to prosecute under the city gambling ordinance of 1886.

(e) Literally read, the statutory provision, which as interpreted by the Arkansas Supreme Court enlarged petitioner's duties as City Attorney, is so vague, indefinite and uncertain as to such new duties that on its face it is repugnant to the due process clause. No one may be required at peril of liberty to speculate as to the meaning of penal statutes; all are entitled to be informed as to what the state commands or forbids. *Cf. Lanzetta* v. *State of New Jersey,* 306 U. S. 451, also *Brinkerhoff-Farris Trust and Savings Co.* v. *Hill,* 281 U. S. 673, *Great Northern Ry. Co.* v. *Sunburst O. and R. Co.,* 287 U. S. 358, 367.

Conclusion

The writ of certiorari should be granted and the decision of the lower court should be reversed

Respectfully submitted,

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BRIEF IN SUPPORT OF PETITION

Opinion

The opinion of the Supreme Court of Arkansas written by Justice Ed F. McFadden and delivered June 28, 1948, appears on pages 93-111 of the Record and is reported in The Law Reporter, Vol. 88, No. 16, page 685, but does not appear in the official reports.

Jurisdiction

This court has jurisdiction under the provisions of Section 237(b) of the Judicial Code as Amended, 28 U.S.C.A. 344(b).

The Supreme Court of Arkansas affirmed the judgment of conviction June 28, 1948 (R. 92), and summarily denied the Petition for Rehearing October 4, 1948 (R. 114).

This criminal case has been passed on by the highest court of the State of Arkansas in which a decision might be had.

Facts

The facts are stated in the Petition at Pages 2-5.

We emphasize:

1. The purpose, method and actions of the Circuit Judge and Prosecuting Attorney pursued in the selection of grand jurors.

2. The prejudice, bias and financial interest of members of the special grand jury, knowingly selected from a partisan political group by exclusion of members of the group or class in which petitioner was a leading member.

3. The exchange of circuits to elude the election of a fair and impartial judge.

4. The furtive resumption of jurisdiction, after petitioner had been arraigned, by the prejudiced, disqualified judge who, without notice to petitioner or his counsel, arbitrarily

terminated petitioner's endeavor toward the attainment of a fair and impartial presiding judge.

5. The action by the Supreme Court of Arkansas in avoiding the federal claim by basing its approval of the special grand jury upon the asserted inherent constitutional authority vested in the circuit court.

6. The new construction of Section 3249 Pope's Digest (the bribery statute), which is in direct conflict with its prior interpretation asserted in *Sims* v. *State*, 131 Ark. 185; as now applied, the charge in the indictment of paying bribes against one (not a defendant) creates a specific charge of receiving bribes against petitioner. As now construed, it imputes guilt to petitioner for another's alleged misconduct.

7. The duty of petitioner to prosecute which is absolutely essential to conviction, and heretofore undetermined and unknown, was newly conceived and manifestly projected by the Supreme Court of Arkansas in this first impression interpretation of Section 9585 Pope's Digest, a penal statute.

Argument

1. The Special Grand Jury—to indict political opponents—was first proclaimed in the campaign pledge of the candidate who coveted the office of Circuit Judge.

Petitioner was a member of the excluded class and has the right therefore to object to exclusion from the jury. *Rawlins* v. *State of Georgia*, 201 U. S. 638, 640; Cf. *Strauder* v. *West Virginia*, 100 U. S. 303, 25 L. Ed. 664;

In *Kentucky* v. *Powers*, 201 U. S. 1, 26 S. Ct. 387, this Court considered the selection of members of the jury on the basis of partisan politics by a subordinate officer.

Prospective jurors must be selected by court officials without systematic and intentional exclusion of any of the economic, social, religious, racial, political, and geographical

groups of a community, since jury competence is an individual rather than a group or class matter. See *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217, 66 S. Ct. 984.

"If as in the Thiel case, we had merely an instance of a petit jury drawn from an improper panel we would remand the cause for a new trial. But, as we have said, the grand jury was likewise drawn from a panel improperly chosen and therefore the indictment was not returned in accordance with the procedure established by Congress. Accordingly the indictment must be dismissed." *Ballard* v. *United States*, 329 U. S. 187, 195, 196, 67 S. Ct. 261, 265.

The undisputed testimony of I. G. Brown, Sheriff, with reference to selecting the Special Grand Jury:

> "Q. Did you talk with the Prosecuting Attorney?
>
> "A. I talked with the Prosecuting Attorney at various times, yes, sir.
>
> "Q. About who you were going to select?
>
> "A. No, sir; not about who I was going to select.
>
> "Q. Did you talk to him about some of the men you did select?
>
> "A. Some of the men I did select" (R. 4).
>
> "Q. How many on this list did you discuss with Mr. McMath or Judge Brown?
>
> "A. I don't recall.
>
> "Q. Could you pick them out if you would look it over?
>
> "A. No, I don't believe I could. I don't remember how many or whether—I am sure that there wasn't a great number of them that I didn't discuss" (R. 6).
>
> "Q. Did you knowingly select any man on the Grand Jury that was a supporter of the ticket that McLaughlin supported?
>
> "A. Knowingly I did not" (R. 12).

Gilbert E. Hogaboom, one of the members of the Special Grand Jury, gave the following undisputed testimony:

> "Q. Were you ever approached by anyone before hand?

"A. I think one person asked me if I had been subpoenaed on the Grand Jury and I told them no, I had not. And they said, 'Well, would you be willing to serve?' And I said, 'Why, I would serve on any Grand Jury I was subpoenaed on. I would have to.'

"Q. Now, who was that?

"A. I believe it was McMath.

"Q. Mr. McMath. When did that happen?" (R. 24-25).

"A. One day when I was leaving the bathhouse, crossing the street—and I don't think the conversation lasted over a minute.

"Q. And you were subsequently——

"A. We didn't stop and talk about anything at all.

"Q. You were subsequently summoned, when?

"A. Yes—oh, I guess several days; quite a while after that. I was at home one afternoon and they summoned me. I guess it must have been three weeks or more after that" (R. 25).

"Q. Did you make a contribution to the G. I.'s?

"A. I did" (R. 25).

"Q. You were fighting McLaughlin back at that time, fourteen years ago?

"A. Well, I fought what I might call corrupt officials since I was twenty-one years old.

"Q. You have been actively, open opposed to him for many years, have you not?

"A. I don't say to him personally. I have got no grievance against Leo right now, except as an official. And I have fought what I called the administration since I was twenty-one years old. The last time I was on the Grand Jury, in 1929, I tried to indict the officials" (R. 25).

"And the action of prosecuting officers on behalf of the State, like that of administrative officers in the execution of its laws, may constitute State action within the purview of the 14th Amendment. The Amendment governs any action of the State, 'whether through its executive or administrative officers.' " Cf. *Mooney* v. *Holohan*, 294 U. S.

103, 55 S. Ct. 340, 342; Cf. *Shelley* v. *Kraemer*, 68 S. Ct. 836.

"An officer charged with the duty of selecting and summoning grand jurors is guilty of contempt of court where he intentionally selects those who have prejudged the particular matter referred to them by the court and have done so solely from the standpoint of partisan politics." *State, ex rel. Richert* v. *Youngblood*, 73 N. E. (2) 174, Indiana.

2. *The prejudiced Judge and his actions.*

The actions of the prejudiced judge infringe upon petitioner's rights in violation of the due process clause of the 14th Amendment by assuming the role of prosecuting attorney, calling the special grand jury, helping select jurors, instructing the special grand jury, exchanging circuits with a judge of his choice, the resulting refusal by the substituted judge to pass on petitioner's motion to elect a special judge, the action taken by the prejudiced judge, after his self-disqualification, and after arraignment of petitioner by the substituted judge in overruling all of petitioner's motions without notice or opportunity to be heard, depriving petitioner of the right to consult with his counsel.

Petitioner filed a written request asking an opportunity to be heard on these motions which were filed under the authority of the Constitution of Arkansas, Article 7, Section 22, providing for the election of a special judge. These requests may or may not have been useful to petitioner but the importance of a disqualified judge attempting to assume jurisdiction, the refusal to give notice to petitioner or his counsel, the refusal of an opportunity to be heard and be present either in person or by counsel and the right to assistance of counsel after arraignment, is too large to permit speculation on its effect. "We hold that denial of opportunity to consult with counsel on any material step after indictment or similar charge and arraignment violates the

14th Amendment." Cf. *Hawk* v. *Olson*, 326 U. S. 271, 66 S. Ct. 116, 120.

"That there must be notice to a party of some kind, actual or constructive, to a valid judgment affecting his rights, is admitted. Until notice is given the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be, by the law of its organization, over the subject-matter." *Hovey* v. *Elliott*, 167 U. S. 409, 17 S. Ct. 841, 843.

"From the time of their arraignment until the beginning of their trial . . . they were as much entitled to such aid during that period as at the trial itself." *Powell* v. *State of Alabama*, 287 U. S. 45, 53 S. Ct. 55.

"Trial must be held before a tribunal not biased by interest in the event". *Tumey* v. *State of Ohio*, 273 U. S. 510, 47 S. Ct. 437.

The judge in this case, after disqualification and exchange of circuits, had no authority to take further action and was therefore without jurisdiction; also without jurisdiction for failure to give notice, infringed upon petitioner's rights by denying a hearing. Although generally the cases referring to the right to have counsel apply only to capital offenses, yet in this case where a petitioner has counsel and has requested a hearing and an opportunity to have his counsel present and a right to consult with them, which has been denied, such denial is an infringement upon due process. "It is enough that petitioner has his own attorney and was not afforded a reasonable opportunity to consult with him." *House* v. *Mayo*, 324 U. S. 42, 46, 65 S. Ct. 517, 520.

"Whether the state rule is expressed in constitution, statute or decision, or partly in one and partly in another, the state's power is to be viewed as a totality. In the absence of a violation of fundamental principle of justice, a

state's determination is conclusive upon the federal courts as to the meaning of the state law, so far as any federal question is concerned." *Akins* v. *State of Texas,* 325 U. S. 398, 399, 65 S. Ct. 1276, 1277.

The Arkansas Constitution provides for filling vacancies and exchange of circuits with reference to the circuit court as follows:

> *Article VII, Sec. 21:* "Whenever the office of judge of the circuit court of any county is vacant at the commencement of a term of such court, or the judge of said court shall fail to attend, the regular practicing attorneys in attendance on said court may meet at 10 o'clock a. m. on the second day of the term, and elect a judge to preside at such court, or until the regular judge shall appear; and if the judge of said court shall become sick or die or unable to continue to hold such court after its term shall have commenced, or shall from any cause be disqualified from presiding at the trial of any cause then pending therein, then the regular practicing attorneys in attendance on said court may in like manner, on notice from the judge or clerk of said court, elect a judge to preside at such court or to try said causes, and the attorney so elected shall have the same power and authority in said court as the regular judge would have had if present and presiding; but this authority shall cease at the close of the term at which the election shall be made. The proceeding shall be entered at large upon the record. The special judge shall be learned in law and a resident of the State."
>
> *Article VII, Sec. 22:* "The judges of the circuit courts may temporarily exchange circuits or hold courts for each other under such regulations as may be prescribed by law."

In the case at bar there is not drawn in question the infringement of petitioner's rights under the due process clause by reason of the probability that these constitutional provisions may have a double meaning.

There is however drawn in question the infringement of petitioner's rights under the Federal Constitution, the 14th Amendment, by the application of these provisions permitted by the Supreme Court of Arkansas, which approved the exchange and re-exchange of circuits by one prejudiced judge with another whereby petitioner was absolutely deprived of any and all rights provided by these sections in his attempt to obtain a fair and impartial judge and to have a hearing on his motions and to have notice of such hearings; to have a right to be present, either in person or by counsel, or both and to consult with counsel with reference to this substantial step after petitioner's indictment and arraignment.

3. *The bribery statute—3249 Pope's Digest:*—(*See Appendix.*)

The verdict found petitioner guilty as charged in the indictment (R. 85).

The indictment is prepared *ex parte* by the prosecuting authority and includes not only opinion but states only a conclusion of guilt. The Supreme Court of Arkansas asserts that it is brought in the words of the statute and is therefore sufficient.

This statute is vague and uncertain and admits of such a double meaning that the Arkansas Supreme Court in 1917, *Sims* v. *State,* 131 Ark. 185, may act upon one conception of its requirements and the Arkansas Supreme Court in 1948 in petitioner's case upon another.

In 1917, it was necessary to charge the bribe receiver with receiving the money with the intention of being influenced in his vote or decision on some matter within the scope of his official duties existing at the time of the act.

In this case in 1948, it is necessary to state only a conclusion, "accepting and receiving" money (two separate

offenses in one count) regardless of intent, purpose or official capacity, is sufficient, and that guilt is imputed to the bribe receiver from a charge against a bribe payer (not a defendant) by the use of the word "bribe". (Incidentally, a bribe payer is not mentioned in the statute and does not exist, as "pay" implies legality and has a well settled common law meaning, and refers only to lawful transactions).

There is but one count in the indictment (R. 71). It purports to charge petitioner with "accepting" and "receiving", "money" and "bribes". The Federal statute "Official Accepting Bribes," Criminal Code, Sec. 117, 18 U. S. C. A. Sec. 207, is similar to the Arkansas statute and has been interpreted as follows: "Under this section, the asking, accepting and receiving of the money are separate offenses." *Egan* v. *U. S.* (1923), 287 F. 958, 52 App. D. C. 384.

The conclusion of guilt as stated in the one count of the indictment is that petitioner accepted and received, twenty-four Fifty Dollar money and bribes, one each month over a period of two years.

After demurrer was filed and argued by petitioner, the State filed a stipulation to the effect, "that the State means to convict upon one felony only." The bill of particulars filed by the State, quote, "The bribe alleged in the indictment was paid by check (R. 82) . . ."

The demurrer was then overruled by the prejudiced Judge on exchange. The demurrer also alleged that the indictment did not charge an offense against the State of Arkansas.

Fifteen checks were introduced as evidence and by general verdict the jury found petitioner guilty as charged in the indictment (R. 85). The fine imposed was Seven Hundred and Fifty Dollars, being the amount of fifteen Fifty

Dollar checks. Petitioner did not receive the other nine checks mentioned in the indictment.

"A bank check is not an obligation for the payment of money, within the legal meaning of such term providing for the punishment of bribery of an official." See *Green* v. *MacDougal*, 26 S. Ct. 749, affirming *U. S.* v. *Green*, 136, F. 618.

In spite of the demurrer and the State's stipulation and petitioner's objection, these separate offenses, accepting and receiving, were submitted to the jury by instruction number one (R. 91) given by the prejudiced Judge on exchange.

This question was raised by objection to the instruction, motion for a new trial, appeal to the Supreme Court, and petition for a rehearing. Petitioner was convicted on fifteen separate overt acts (checks for attorney fees) of accepting and receiving (two separate offenses) money and bribes (two separate things) all contained in one count, and evidenced by fifteen personal checks, with no charge of intent or purpose, official duty or scope of authority.

"Unlawfully, feloniously, corruptly," as used in the indictment, does not appear in the statute and describes only the grade of an act constituting offense and does not imply specific design or distinct element of crime.

In 1917 guilt was personal and the indictment under which petitioner was convicted in this case would not have charged an offense against him.

In 1948 petitioner was convicted upon a charge not made against him but held to answer for a purported charge of guilt against another.

"The finding against petitioner was a general one. It did not specify the testimony upon which it rested. The charges were framed in the words of the statute and so must be given a like construction. The court below expressed no

intention of narrowing the construction put upon the statute by a prior state decision. In these circumstances, there is no occasion to go behind the face of the statute or of the complaint for the purpose of determining whether the evidence, together with the permissible inferences to be drawn from it, could ever support a conviction founded upon different and more precise charges." *E. g. Thornhill* v. *State of Alabama,* 310 U. S. 88, 96, 60 S. Ct. 736, 741.

"Conviction upon a charge not made would be sheer denial of due process," *De Jonge* v. *Oregon,* 299 U. S. 353, 362, 57 S. Ct. 255, 259, 81 L. Ed. 278; *Stromberg* v. *California,* 283 U. S. 359, 367, 368, 51 S. Ct. 532, 75 L. Ed. 1117.

"Persons may not be required at peril of life, liberty or property to speculate concerning meaning of a penal statute, but all are entitled to be informed concerning what the state commands or forbids." Cf. *Lanzetta* v. *State of New Jersey,* 306 U. S. 451, 59 S. Ct. 618; *Connally* v. *Genl. Const. Co.,* 269 U. S. 385, 391, 46 S. Ct. 126, 127, 70 L. Ed. 322.

4. *The statute enlarging duties, Section 9585 Pope's Digest; approved March 9, 1929: Failure to execute laws:*

"If the mayor or police judge, member of the city council or any other elective officer of any city of the first class, second class, or incorporated town in this State, shall willfully and knowingly fail, refuse, or neglect to execute or cause to be executed any of the laws or ordinances within their jurisdiction, they shall be deemed guilty of nonfeasance in office; and it shall be the duty of the Circuit Court of any County within which any such officer may be commissioned and acting, upon indictment charging any such officer with non-feasance in office, to hear and determine such charges, and if upon hearing the charges be proven to be true, to enter a judgment of record removing such guilty officer from office, provided the Council of any city or incorporated

town may provide by proper ordinance for the removal of any appointive officer upon a majority vote of such Council."

To convict an officer or a person holding a place of profit and trust involving public service, of the crime of bribery, it is elementary that the said person have some duty or right to vote or decide some matter within the scope of his official capacity in the performance or nonperformance of which his actions may be influenced.

Prior to the construction placed upon the above statute by the Supreme Court of Arkansas in this case, there was no duty, power or authority with reference to the office of City Attorney of the City of Hot Springs whereby the City Attorney was either required or authorized to prosecute persons for violation of state laws or city ordinances.

This statute was passed for the purpose of removing elected city officials from office in the event that they knowingly refused to perform the duties and actions with reference to their individual offices as prescribed by the laws and ordinances with reference thereto.

If, as construed by the Supreme Court, it increases and enlarges their duties and particularly the duties of the City Attorney so that in addition to the duties heretofore prescribed he is elevated to the office of prosecuting attorney, then in that event, this statute would have a double meaning so that petitioner may act upon the conception that he was to perform the duties within the jurisdiction of the office of city attorney as provided by the ordinances of the City of Hot Springs, and the court upon another. *Connally* v. *Genl. Const. Co.*, 269 U. S. 385, 393, 46 S. Ct. 126, 128.

The duties of the City Attorney of cities of the first class are to be prescribed by ordinance adopted by the City Council as provided by Section 9819 Pope's Digest which

is the statute of 1894 creating the office of city attorney in cities of the first class. (See Appendix)

The ordinance approved March 6, 1896 sets forth the duties and jurisdiction of city attorneys of the city of Hot Springs and has been consistently adhered to by petitioner, as city attorney, and all of his predecessors in office during a period of over 50 years.

This penal statute is now newly construed by the first impression decision of the Supreme Court of Arkansas giving to petitioner as city attorney newly found powers and duties and thereby transgressed due process clause of the 14th Amendment. Cf. *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U. S. 673, 677, 678, 50 S. Ct. 451, 453 (R. 159).

Although this particular statute does not create a new crime with reference to the case at bar, it does create a new duty and obligation upon which a charge of bribery may be predicated, which charge could not have been made or sustained prior to this construction and at the time the said offense of receiving bribes was alleged to have been committed.

Thus, the retroactive decision with *ex post facto* effect sustained the petitioner's conviction of bribery.

"The administration of justice by an impartial judiciary has been basic to our conception of freedom ever since Magna Carta. It is the concern not merely of the immediate litigants. Its assurance is everyone's concern, and it is protected by the liberty guaranteed by the Fourteenth Amendment. That is why this Court has outlawed mob domination of a courtroom, *Moore* v. *Dempsey,* 261 U. S. 86, 43 S. Ct. 265, 67 L. Ed. 543, mental coercion of a defendant, *Chambers* v. *Florida,* 309 U. S. 227, 60 S. Ct. 472, 84 L. Ed. 716, a judicial system which does not provide disinterested judges, *Tumey* v. *Ohio,* 273 U. S. 510, 47 S. Ct. 437, 71 L. Ed. 749, 50 A. L. R. 1243, and discriminatory

selection of jurors, *Pierre* v. *Louisiana,* 306 U. S. 354, 59 S. Ct. 536, 83 L. Ed. 757; *Smith* v. *Texas,* 311 U. S. 128, 61 S. Ct. 164, 85 L. Ed. 84."

Conclusion

Petitioner, therefore, respectfully appeals to the due process and equal protection of the law provided by the Fourteenth Amendment to the Constitution of the United States and asks that the Supreme Court of the United States, in the exercise of its judicial discretion, determine the matters presented herein.

That it is a matter of great public importance and concern, because of the seeming tendency, throughout the states, to institute criminal prosecution against political opponents for the purpose of arousing public favor or disfavor through radio and press reports of criminal trials and proceedings.

That state action taken by a Circuit Judge and Prosecuting Attorney, prompted by partisan politics and the desire and ambition for political advancement and promotion, in selecting members of the special grand jury has not been squarely presented to this Court.

For the reason that the exchange of circuits by a judge disqualified by political prejudice, which permits him to select another judge to preside and then later, by reexchange of circuits, this prejudiced judge is permitted to reassume jurisdiction and overrule all of the motions and pleadings filed by petitioner in his attempt to secure a fair and impartial judge, this, without notice, hearing, right to be present in person or by counsel and to consult with counsel after petitioner has been arraigned by the prejudiced judge on exchange, which judge had refused to pass upon petitioner's motion, thereby depriving petitioner of substantive rights without providing adequate notice and

opportunity to defend. This has, of course, long been regarded as a denial of the due process guaranteed by the Fourteenth Amendment and is a matter of public interest and of interest to the Bench and Bar, particularly in Arkansas and other states where the right of a prejudiced judge to select another judge has not been definitely determined as to whether it infringes upon the due process clause.

It has not been determined whether the prejudiced judge, having been disqualified, can, under the statute permitting exchange of circuits, reexchange circuits and reassume jurisdiction and take further action, thereby depriving petitioner of substantive rights after arraignment.

The action of the State through the Supreme Court of Arkansas in the interpretation and conflicting reinterpretation of the provisions of the bribery statute, Sec. 3249 of Pope's Digest, and its first impression interpretation of Sec. 9585 of Pope's Digest, statutes having a double meaning, and so vague as to make criminal an innocent act, by retroactive decision with *ex post facto* effect is State action in violation of the Fourteenth Amendment and is of great public importance as has been set forth in decisions of the Supreme Court of the United States, and it is necessary that the principle be maintained. These objections the petitioner could not make in advance of the event.

The matters involved upon which this petition is based are shown in the record by the rulings and orders made by the Court, by the statements in petitioner's motions and pleadings which are unanswered and uncontradicted by the State, and by the undisputed testimony of the Sheriff and members of the Special Grand Jury called as witnesses by the petitioner, and the opinion of the Supreme Court of Arkansas, the highest Court in the State to which

the matter could be submitted upon appeal and upon petition for rehearing.

For these reasons, certiorari has been chosen by petitioner as the proper method of presenting this case in order that the Supreme Court of the United States may exercise its discretion as to whether petitioner's rights under the Fourteenth Amendment have been infringed or denied, by the action of the State, through its officers and courts.

Respectfully submitted,

C. Floyd Huff, Jr.,
Arkansas Trust Building,
Hot Springs, Arkansas;
Henry Donham,
Boyle Building,
Little Rock, Arkansas,
Counsel for Petitioner.

APPENDIX

Act 210, Acts of Arkansas 1909, Section 1

Section 3249, Pope's Digest

Bribery of legislators and public officers. If any persons shall, directly or indirectly, promise, or offer to give, or cause to procure to be promised, offered or given, any money, goods, right in action, bribe, political appointment, political influence, present or reward, or any promise, contract, undertaking, obligation or security for the payment or delivery of any goods, money, right in action, bribe, political appointment, political influence, present or reward, or any other valuable thing whatever, to any member of the General Assembly of the State of Arkansas, after his election as such member, and either before or after he shall have qualified and taken his seat, or to any officer of the State, or person holding any place of profit or trust, under any law of the State, or under the order of either house of the General Assembly, with intent to influence his vote or decision on any question, matter, cause or proceeding which may then be pending, or may by law, or under the Constitution of the State, be brought before him in his official capacity, or in his place of trust or profit, and shall be convicted thereof, such person so offering, promising or giving, or causing, or procuring to be promised, offered or given, any such money, goods, right in action, bribe, political appointment, political influence, present or reward, or any promise, contract, obligation or security for the payment or delivery of any money, goods, right in action, bribe, political appointment, political influence, present or reward, or other valuable thing whatever, and the member, officer or person who shall in any wise accept or receive the same, or any part thereof, shall be liable to indictment in any court having jurisdiction, and shall, upon conviction thereof, be fined in any sum not exceeding double the amount so offered, promised or given, and be imprisoned in the penitentiary not exceeding two years, and the person convicted of so accepting or receiving the same, or any part thereof, if an officer or person holding any such office, place of trust or

profit as aforesaid shall forfeit his office or place; and any person so convicted shall forever be disqualified to hold any office of trust or profit under the Constitution or laws of this State.

Pope's Digest, Section 9819. Election of Officers:

> "The qualified voters of cities of the first class shall on the first Tuesday in April, 1875 and every two years thereafter, elect one mayor, one city treasurer and one police judge, who shall hold their offices two years, and until their successors are elected and qualified, and shall have such powers and perform such duties as are required by law, or may be prescribed by any ordinance of the city not inconsistent with this chapter. Also one city clerk and one city attorney shall be elected in 1894 and every two years thereafter, who shall hold office for two years, and until their successors are elected and qualified; who shall give the bond, perform the duties and receive such salary as is now or may hereafter be prescribed by ordinance in each of said cities of the first class. Act March 9, 1875, sec. 51, p. 1, March 28, 1885, p. 141, and April 11, 1893, p. 264."

An Ordinance Defining the Duties of the City Attorney of the City of Hot Springs

"Be it Ordained By the City Council of the City of Hot Springs, That:

Section One. The City Attorney be, and is hereby required to keep a docket of all cases to which the City may be a party in Courts of Record, except the Police Court, in which shall be briefly entered all steps taken in each case which shall at all times be open to the inspection of the Mayor, or any committee of the Council. It shall be also his duty to draft all Ordinances, Bonds, Contracts, Leases, Conveyances, and such other instruments of writing as may be required by the business of the City, and to furnish written opinions upon subjects of a legal nature submitted to him by the Council, and to conduct all law business in

which the City may be interested in, whenever called upon by the Police Judge in cases of special importance and represent the City in its Police Court.

Section Two: He shall semi-annually, at the last regular meeting of the City Council in September and March during his term of office, report in writing to the Council a statement of all suits instituted or pending during his term of office, in Courts of Record, except Police Court, in which the City is Plaintiff or Defendant, the nature of the action, the date of commencement and the several steps taken in the Court by him; such suits to a final issue to be accompanied with such explanatory remarks as he may see fit to append, to the end that the Council may be more fully advised as to the legal affairs of the City. He shall also attach to said report a list of all such cases as may have been disposed of subsequent to his last report.

Section Three. Any monies or other funds collected, or received by him for the City, shall be at once turned over to the City Treasurer and his receipt taken therefor and filed with the City Clerk.

Section Four. Upon the expiration of his term of office or his resignation or removal therefrom, he shall upon demand deliver to his successor all books and papers belonging to the City or delivered to him by the City or any of its officers, and all papers in actions, prosecuted or defended by him then pending and undetermined, together with his docket or register thereof and of the proceedings therein.

Section Five. This ordinance to take effect on and after its passage and all ordinances, or parts of ordinances, in conflict with this ordinance is hereby repealed.

Passed: March 2, 1896. Approved: March 6, 1896. Signed: W. W. Waters, Mayor. Attest: Wm. L. Gordon, City Clerk."

Pope's Digest, Section 9585. Failure to execute laws:

> "If the mayor or police judge, member of the city council or any other elective officer of any city of the first class, second class, or incorporated town in this State, shall wilfully and knowingly fail, refuse, or

neglect to execute or cause to be executed any of the laws or ordinances within their jurisdiction, they shall be deemed guilty of non-feasance in office; and it shall be the duty of the Circuit Court of any County within which any such officer may be commissioned and acting, upon indictment charging any such officer with non-feasance in office, to hear and determine such charges, and if upon hearing the charges be proven to be true, to enter a judgment of record removing such guilty officer from office, provided the Council of any city or incorporated town may provide by proper ordinance for the removal of any appointive officer upon a majority vote of such Council."

GARLAND CIRCUIT COURT

STATE OF ARKANSAS

against

JAY M. ROWLAND

INDICTMENT

The Grand Jury of Garland County, in the name and by the authority of the State of Arkansas, accuse Jay M. Rowland of the crime of accepting and receiving bribes committed as follows, to-wit: The said Jay M. Rowland in the County and State aforesaid, being then City Attorney of the City of Hot Springs, a place of profit and trust under the laws of the State of Arkansas, unlawfully, feloniously, and corruptly accepted and received:

Money and Bribes, to-wit: $50.00 per month each month in the years 1945 and 1946 from Otis McCraw, Sr., and J. O. McCraw, operators of The "Southern Club Book", Hot Springs, Garland County, Arkansas, a Bookmaking and Gambling Establishment. The Money and Bribes were paid to Jay M. Rowland for himself and Leo P. McLaughlin with intent to influence Rowland's actions and decisions as City Attorney, pertaining to state laws and ordinances of the

City of Hot Springs, Arkansas, which prohibit gambling and the operation of gambling houses insofar as they applied or might apply to Otis McCraw, Sr., J. O. McCraw, or The "Southern Club Book." Such Money and Bribes, totalling $1200.00 during the years 1945 and 1946, were paid to Jay M. Rowland for himself and Leo P. McLaughlin, against the peace and dignity of the State of Arkansas.

(S.) SIDNEY S. MCMATH,
Prosecuting Attorney.

Witnesses:

Jack McJunkin, Walter Weldon,
A. J. (Tony) Karsten, George Pakis,
Erb Wheatley, Louis Larsen, Gordon Henderson,
Louis Longinotti, Fred Nickels, Otis McCraw, Sr.,
J. O. McCraw

[Endorsed:] No. 3911. State of Arkansas vs. Jay M. Rowland. A true bill. (S.) Richard L. Craigo, Foreman. Indictment for Bribery. Filed in open Court in the presence of all the Grand Jurors this 19 day of March, 1947. (S.) Leonard R. Ellis, Clerk. Issue Bench Warrant and require Bail in the sum of One Thousand Dollars ($1,000.00). (S.) Clyde H. Brown, Judge. Bench Warrant issued March 19th, 1947. Bench Warrant served March 19, 1947.